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AMERICANS WITH DISABILITIES ACT NEWSLETTER

AUGUST 2009

This newsletter is intended to provide an update of developments affecting compliance with the ADA and the 2008 ADA Amendments Act. This information is provided by David K. Fram, Esq, Director, ADA & EEO Services for NELI, as a courtesy to those in the employment community who have utilized NELI's ADA training services. Mr. Fram may be reached at NELI at 303-861-5600 or by email at neli@neli.org. Nothing in this newsletter is to be construed as legal advice from Mr. Fram or NELI.

2009 ADA WORKSHOP

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A limited enrollment Workshop covering the latest significant court cases, EEOC's latest policies, and the impact of the ADA Amendments Act and EEOC's proposed regulations.

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Update on the EEOC's Proposed ADAAA Regulations.

On June 17, 2009, the EEOC passed (by a 2-1 vote) proposed regulations on the ADA Amendments Act. These proposed regulations, which I briefly discuss below, are now being reviewed by the White House Office of Management and Budget (OMB). OMB has up to 90 days for its review. After OMB's approval, the proposed regulations will be published in the Federal Register for "review and comment" by the public. Following this 60 day review, the EEOC will make any changes it deems necessary and will pass its final regulations. So, it could be late 2009 or early 2010 before EEOC passes final regulations. However, based on statements the EEOC has made, I think it is very likely that they will take the position that the final regulations apply retroactively to January 1, 2009. So, it is critical for employers to know the content of the proposed regulations.

Unfortunately, until the EEOC publishes the proposed regulations in the Federal Register (for public review and comment), it is declining to release the text of its proposal. However, at the June

17, 2009, meeting, the EEOC's Assistant Legal Counsel gave a detailed description of what is in the proposal. Many of you heard the lively discussion of these issues during NELI's July 2009 audio conferences on the proposed regulations.

Much of the EEOC's proposal tracks the language of the statute and the clear intent of Congress. However, some positions surprised many of us at the June 17 meeting. For example, the EEOC says that individuals with conditions such as cancer, epilepsy, MS, and diabetes will consistently satisfy the ADAAA's definition of disability. Commentators have noted that this non-analytical approach seems at direct odds with the Congressional intent requiring an "individualized assessment" in determining whether a particular condition is a disability.

In discussing the need to analyze conditions in their unmedicated/unmitigated state, the EEOC's proposed regulations mostly track the statute. However, in several significant aspects, the proposed regulations have raised eyebrows. For example, the EEOC's proposal states that individuals should be analyzed with-

out regard to "surgical interventions" (in addition to medications, prosthetic devices, etc.). Some management advocates have pointed out that this could open the door for anyone who has ever had even routine stitches to argue that s/he has a "record of" a disability; this is based on the fact that most people have had stitches (at some point in their lives) and arguably would have had severe consequences rising to the level of a disability if they had not had the stitches.

Importantly, it also appears that in the proposed regulations, EEOC is reverting to its position (from many years ago) that in determining whether someone is "substantially limited," an employer should not evaluate what the individual is "able" to perform. Rather, the focus should be solely on what the individual is unable to perform. For example, if someone claims to be substantially limited in walking, an employer should not look at activities the individual still performs that involve walking. The EEOC's position is inconsistent with hundreds of federal court decisions over the years and will likely be challenged in litigation.

In counterpoint, there were some pleasant surprises in the EEOC's proposed regulations. For example, the EEOC does not seem to be altering its view that a condition must last several months to be sufficiently long-

term. In addition, although the EEOC changes its analysis of when an individual will be considered substantially limited in "working," it did not decide to take the position that the inability to perform a specific job is enough to be considered a disability.

Most employer and disability-rights advocates were disappointed that the EEOC did not provide an actual standard for employers or courts to use in determining what it means to be "substantially limiting." For example, the EEOC could have stated that "substantial limitation" means "more than minor," "serious," or some other variation. Their lack of guidance on this issue means that each and every Court of Appeals will now be free to decide a standard, which will likely lead to a number of different standards and years of litigation.

I personally think it unlikely that the EEOC will make major changes to its positions before issuing final regulations. The Commission is in a progressive mood, and I think it will become even more progressive over the coming months and years. For example, in July, the President nominated Jacqueline Berrien, Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, to be Chair of the EEOC. Ms. Berrien has a reputation as a strong and highly intelligent advocate for progres-

sive causes. In addition, the President will still have two more open Commissioner slots to fill.

We will be discussing these and many other issues raised by the EEOC's proposed regulations at NELI's ADA Workshops in September.

Should Employers Just Assume "Disability?"

It's true that, under the ADAAA, more individuals will have covered disabilities. In recent months, many employers have told me that they now just assume that anyone requesting accommodation has a covered disability, rather than analyzing the issue. However, on closer analysis, this is not really what they are doing.

In fact, what seems to be happening is this: When an individual requests a modification that is simple and easy to provide, the employer frequently assumes "disability," bypassing the time-consuming, step-by-step analysis. This makes good, practical sense as long as the employer does not label the modification as a "reasonable accommodation" and documents that the employer has not even analyzed the issue of "disability." I also have pointed out to employers that it is helpful to document that the modification was made pursuant to a request from the employee, in order to avoid any

implication that the employer has speculated that the employee has a disability.

However, when an individual requests a modification that is difficult or expensive, virtually all employers still go through the formal disability analysis to determine whether the individual is covered under state or federal law. For this reason, employers and human resource professionals must stay current on the new definition of disability.

The Current "Hot" Issues.

Not surprisingly, the definition of "substantially limits" will be an interesting issue to watch over the coming years. As noted above, since the EEOC has punted on providing an actual definition, it will be up to the courts to decide. So, I'll be keeping a close eye on what the Courts of Appeals say on this question.

Aside from ADAAA topics, there are many other important issues that courts have weighed in on over the past year. For example, in determining whether an individual is "qualified," a number of cases have focused on whether particular tasks are "essential." This year, along with many other decisions, Courts of Appeals have held that the ability to get along with others can be essential, predictable attendance can be essential, and lifting can be essential. In addition, both the Third and Fifth Circuits have

joined other courts in holding that promotions/performance reviews can be critical evidence in determining whether an individual is qualified.

On "reasonable accommodation" issues, the Courts of Appeals have provided guidance on hundreds of practical issues. For example, this year, the Fifth and Sixth Circuits seem to have joined the Ninth Circuit in holding that the interactive process is a mandatory obligation. Courts also have continued to give guidance on what employers should do as part of this process; for example, one Court of Appeals held that employers can show a good faith attempt to accommodate by meeting with the employee, requesting information about the limitations, considering the employee's requests, and discussing alternatives if a request is burdensome. Courts have been very progressive concerning whether particular modifications might be required accommodations, such as additional leave, work-at-home, and reassignment. However, there also have been quite a few cases stating that indefinite leave is not required, thereby setting up a legal battle between the EEOC and the federal courts.

I continue to think that the most difficult reasonable accommodation issue is whether non-competitive reassignment is required. Although the Supreme Court was scheduled to decide this issue

last year in the case of *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), the case settled just before oral argument. No doubt this issue is on the Supreme Court's radar screen.

We will be discussing all of these fast-breaking issues at the September ADA Workshops.

I hope you'll join us!

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WASHINGTON DISABILITY LAW WORKSHOP

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(HALF-DAY PRECEDING THE
ADA WORKSHOP)

CALIFORNIA DISABILITY LAW WORKSHOP

LOS ANGELES • SEPT 14
SAN FRANCISCO • SEPT 17
(HALF-DAY PRECEDING THE
ADA WORKSHOP)